



**DEPARTMENT OF DEFENSE**  
**DEFENSE LEGAL SERVICES AGENCY**  
**DEFENSE OFFICE OF HEARINGS AND APPEALS**  
**APPEAL BOARD**  
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Date: May 21, 2024

In the matter of:	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Mendez, Esq., Chief Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 20, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision based on the written record, without a hearing. The Government submitted a File of Relevant Material (FORM) containing the entire record and the Government’s argument. Applicant submitted a timely response to the FORM. On March 21, 2024, Defense Office of Hearings and Appeals Administrative Judge Roger C. Wesley denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged under Guideline H that Applicant used and purchased marijuana from about February 2021 to about May 2022, while granted access to classified information; and he used ecstasy from about December 2021 to about May 2022, while granted access to classified information. Applicant admitted both SOR allegations with explanations and clarifications. The Judge found against him on both allegations.

On appeal, Applicant contends the Judge failed to follow relevant law and regulation by failing to consider all relevant evidence submitted by Applicant. Consistent with the following, we affirm.

### **Judge's Findings of Fact and Analysis**

Applicant is in his mid-twenties and has been employed by a defense contractor since March 2020. He earned a bachelor's degree in mechanical engineering in 2019. He is unmarried and has no children. He was previously granted access to classified information in January 2021 after signing a non-disclosure agreement in March 2020. He used marijuana with varying frequency from about February 2021 to May 2022. He assured that, since the submission of his security clearance application (SCA) in November 2022,<sup>1</sup> he has not used marijuana. Decision at 2. In an updated personal subject interview (PSI) in May 2023, Applicant assured that he no longer associates with the friends with whom he used illegal drugs. Applicant was granted a security clearance in January 2021 and signed a non-disclosure agreement (NDA) in March 2020. His use of marijuana and ecstasy after being granted access to classified information and signing the NDA violated the commitment he made to avoid involvement with illegal drugs while holding a security clearance.

Applicant pledged to abstain from purchasing cannabis products and stated his willingness to sign a statement of intent to abstain from all illegal drugs, to avoid all contact with friends who use drugs, to attend re-education and drug treatment programs, to be evaluated by a mental health professional, and to take better care of himself without illegal drugs. The Judge noted that "while encouraging, commitments made to avoid illegal drugs while holding a security clearance cannot be discounted or relaxed absent either exigent circumstance or credible independent evidence, which are not present in Applicant's case." *Id.* at 3.

To his credit, Applicant has committed to abandoning all involvement with marijuana and ecstasy and all illegal drugs. He is credited with remaining abstinent for over 18 months and exhibits no visible signs of indications of succumbing to any risks or pressures he might encounter to return to illegal drug use in the foreseeable future. His assurances of sustained abstinence from marijuana and ecstasy and avoidance of associations with friends with whom he shared illegal drugs are encouraging and warrant limited application of mitigating conditions. However, his recent use of marijuana and ecstasy while granted access to classified information makes it too soon to absolve him of risks of recurrence. Without more time and evidence from corroborating sources to establish a probative pattern of sustained abstinence, none of the mitigating conditions fully apply. Among Applicant's commitments when approved for a security clearance is his promise to avoid involvement with illegal drugs. It is this commitment to abstinence that Applicant breached when he resumed his illegal drug use.

### **Discussion**

On appeal, Applicant's counsel argues the Judge failed to consider all available evidence and failed to properly apply the mitigating conditions, in particular, the positive steps Applicant has taken to ensure the security concerns were mitigated. Additionally, he argues that the Judge's

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<sup>1</sup> The Decision mistakenly cites to November "2020" rather than November "2022" as supported by the evidence.

finding regarding Applicant's period of abstinence and disassociation from the friends with whom he shared illegal drugs was incongruent and contrary to his conclusion that more time and evidence was needed from corroborating sources to establish a probative pattern of sustained abstinence from illegal drugs. Appeal Brief at 8-9.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. E.g., ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Here, Applicant was granted a secret security clearance in January 2021 and is seeking to upgrade to a top-secret clearance. Applicant's post-FORM submission - Item 7. In his appeal, Applicant does not contest the Judge's conclusions with regard to his use of illegal drugs while granted access to classified information, rather he takes issue with the conclusion that insufficient time has passed to warrant mitigating credit for his period of abstinence and asserts that Applicant's proposed efforts at mitigation were not considered.

Regarding the passage of time since Applicant's last involvement illegal drugs, the Judge found that "Applicant's recent use of marijuana and ecstasy while granted access to classified information makes it too soon to absolve him of risks of recurrence." Decision at 6. Also, the Judge's conclusion that more time and evidence is needed to "establish a probative pattern of sustained abstinence" is consistent with his finding that mitigating conditions AG ¶¶ 26(a) and (b)<sup>2</sup> were not fully applicable. *Id.* The Directive does not define "recent," and the Board has declined to adopt any "bright-line" definition for what constitutes "recent" conduct. Rather, the Board has

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<sup>2</sup> AG ¶ 26 (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. AG ¶26 (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. *E.g.* ISCR Case No. 11-12165 at 4 (App. Bd. Jan. 29, 2014). Upon our review, the Judge's findings are supported by substantial evidence of record, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. The Judge acknowledged Applicant's pledges in his post-FORM submission and found them to be "encouraging," however he held that such commitments under these circumstances required credible, independent evidence that was not presented by Applicant.

Applicant's remaining assertions amount to a disagreement with the Judge's weighing of the evidence. We have noted that such a disagreement or an ability to argue for a different interpretation of the evidence is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). As the Appeal Board has previously stated, after applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023).

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

**Order**

The decision is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski  
Administrative Judge  
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi  
Administrative Judge  
Member, Appeal Board

Signed: James B. Norman

James B. Norman  
Administrative Judge  
Member, Appeal Board